

NO. 47611-8-II

**COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION II**

STATE OF WASHINGTON,

Respondent,

vs.

COREAN O. BARNES,

Appellant.

BRIEF OF APPELLANT

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ASSIGNMENT OF ERROR

Assignment of Error

The trial court violated the defendant's right to due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, when it added a sexual motivation enhancement to the defendant's sentence for burglary because the jury instruction that this court previously found impermissibly shifted the burden of proof on a rape charge arising out of the same act also shifted the burden of proof on the sexual motivation finding.

Issues Pertaining to Assignment of Error

In a case in which the state charges second degree rape and first degree burglary with sexual motivation out of the same act, does an appellate court finding that a jury instruction impermissibly shifted the burden of proof on the rape charge also shift the burden of proof on the sexual motivation finding in violation of the defendant's right to due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment?

STATEMENT OF THE CASE

By information originally filed on November 22, 2008, and later amended on February 18, 2009, the Clallam County prosecutor charged the defendant Corean O. Barnes with two counts of second degree rape (Counts I and II), one count of first degree burglary with sexual motivation (Count III) and one count of unlawful imprisonment (Count IV), all alleged to have occurred on August 15, 2008. CP 135-138, 131-133. The second degree rape charge from Count II and the first degree burglary charge from Count III arose from the same alleged conduct. *See* unpublished decision in *State v. Barnes*, 181 Wn.App. 1035, f. 4, *review denied*, 339 P.3d 634 (Wash. 2014).

The defendant was later convicted on all counts and appealed. CP 117-130. By an unpublished decision which became final on February 4, 2011, this court reversed all of the defendant's convictions and remanded for a new trial upon a finding that the trial court's admission of recorded statements into evidence in violation of the privacy act denied the defendant a fair trial. CP 112-116; *see also State v. Barnes*, 157 Wn. App. 1076 (2010), as amended on denial of reconsideration (Jan. 4, 2011).

The defendant subsequently went to a second jury trial and was convicted on all counts a second time. CP 96-111. He again appealed. CP 95. As part of the decision on this second appeal this court set out the following factual background for this case:

Corean Barnes and Christina Russell met in 2007 and dated between 2007 and 2008. They developed a sexual relationship. By August 2008, Russell decided that she did not want to have a further relationship with Barnes, but agreed to drive Barnes on various errands. On August 15, Russell purchased a digital tape recorder and placed it in her purse in order to surreptitiously record her conversations with Barnes.

Later that day, Russell met Barnes at the house of Kenneth Johnson, who had rented a room to Barnes starting in July 2008. According to Russell, Barnes began making unwanted sexual contact with her. Russell testified that Barnes reached through her car window, touched her breasts, and put his hand down her pants. She told him to stop and said she did not want to do that. Barnes then pulled Russell out of the car by her wrists and forcibly carried her to his nearby camper. Russell testified that after a struggle, Barnes put his hand down her pants and penetrated her vagina with his finger. During this time, Russell was trying to break free and was telling Barnes that she did not want to do this. Barnes admitted touching Russell's breasts over her shirt but denied the remainder of Russell's testimony.

Russell also described another incident later that day, after she picked up Barnes and drove him to Johnson's house. She and Barnes entered Johnson's house. Russell testified that they started kissing, but she decided she did not want to continue and attempted to pull away. Barnes then picked her up and carried her into a bedroom. As she attempted to get away, he closed the door and pushed her into a corner. Russell testified that she continued to struggle, but Barnes forced her pants down. Although she kept telling him no, he had intercourse with her before she broke away. Barnes testified that Russell was a willing participant in the intercourse until she decided to stop after about two minutes, at which time Barnes stopped as well.

Russell secretly recorded both incidents. She also recorded lengthy conversations with Barnes around the time of the incidents. Some of the statements involved Barnes's threats to harm Russell.

On August 19, Johnson arrived home to find Barnes inside his house. Johnson objected to him being there without permission and called the police.

The State charged Barnes with two counts of rape in the second degree by forcible compulsion (counts one and two), one count of burglary in the first degree with sexual motivation (count three), and one count of unlawful imprisonment (count four), and two counts of harassment (counts five and six).

State v. Barnes, 181 Wn. App. 1035 review denied, 339 P.3d 634 (Wash. 2014).

In the second appeal in this case the defendant argued, *inter alia*, that the trial court denied him the right to a fair trial when it instructed the jury on the affirmative defense of consent because he had not requested the instruction nor argued the affirmative defense. *see State v. Barnes, supra*. Thus, the defendant argued that the trial court's decision to instruct on this defense impermissibly shifted the burden of proof and required him to prove consent. *Id.* This court agreed, reversed the two rape convictions and remanded for a new trial. *Id.*

Prior to the third trial in this case the court granted a state's motion to dismiss the two rape charges. CP 56-57. The court then proceeded to a new sentencing hearing during which it imposed a life sentence on the burglary charge with a minimum mandatory time to serve of 44 months before the defendant can first be considered for release. CP 12-28. Following imposition of this sentence the defendant filed his third notice of appeal. CP 8.

ARGUMENT

THE TRIAL COURT VIOLATED THE DEFENDANT'S RIGHT TO DUE PROCESS WHEN IT ADDED A SEXUAL MOTIVATION ENHANCEMENT TO THE DEFENDANT'S SENTENCE FOR BURGLARY BECAUSE THE JURY INSTRUCTION THAT THIS COURT PREVIOUSLY FOUND IMPERMISSIBLY SHIFTED THE BURDEN OF PROOF ON A RAPE CHARGE ARISING OUT OF THE SAME ACT ALSO SHIFTED THE BURDEN OF PROOF ON THE SEXUAL MOTIVATION FINDING.

Under the United States Constitution, Sixth Amendment, a criminal defendant has the implicit right to control his or her defense. *State v. Lynch*, 178 Wn. 2d 487, 309 P.3d 482 (2013); *Faretta v. California*, 422 U.S. 806, 819, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). Thus, “[i]nstructing the jury on an affirmative defense over the defendant’s objection violates the Sixth Amendment by interfering with the defendant’s autonomy to present a defense.” *State v Lynch*, 178 Wn.2d at 492 (quoting *State v. Coristine*, 177 Wn.2d 370, 375, 300 P.3d 400 (2013)). The decision in *State v. Coristine* explains this principle.

In *State v. Coristine*, *supra*, a defendant convicted of second degree rape of a person incapable of consent appealed, arguing that the trial court violated his Sixth Amendment right to control his own defense when it instructed the jury under RCW 9A.44.030 that (1) it is a defense to the charge of second degree rape if the defendant “reasonably believed” that the alleged victim was not mentally incapacitated or physically helpless, and (2) the

defendant had the burden of proving that reasonable belief by a preponderance of the evidence. The trial court had given this instruction over the defendant's objection because the defendant had affirmatively presented evidence during the trial to support the conclusion that the complaining witness was capable of giving consent. Although the Court of Appeals rejected this argument, the Washington Supreme Court reversed, finding that "[i]mposing a defense on an unwilling defendant impinges on the independent autonomy the accused must have to defend against charges." *State v. Coristine*, 177 Wn.2d at 377.

Similarly, in *State v. Lynch, supra*, a defendant convicted of second degree rape appealed his conviction upon an argument that the trial court's decision to instruct the jury on the affirmative defense of consent also violated his Sixth Amendment right to control his defense because he had not endorsed this claim. Rather, he had simply argued before the jury that the state had failed to prove absence of forcible compulsion, which was an element of the crime charged. The court agreed and reversed, holding that the use of the affirmative defense of consent instruction over the defendant's objection "violated [the defendant's] Sixth Amendment right to control his defense" *State v. Lynch*, 178 Wn. 2d at 494.

In the case at bar this court held in the defendant's second appeal that the trial court's use of the same consent instruction as was used in *Lynch*

denied the defendant his Sixth Amendment right to control his own defense in the same way that it did in *Lynch*. This court held:

Here, as in *Coristine* and *Lynch*, Barnes objected to instructing the jury on the affirmative defense of consent, which stated that Barnes had to prove by a preponderance of the evidence that his sexual intercourse with Russell was consensual. Barnes objected on the grounds that the instruction (1) would confuse the jury, (2) would relieve the State of proving every element beyond a reasonable doubt, and (3) would require him to pursue an affirmative defense of consent. And the record does not show that Barnes expressly argued an affirmative defense of consent. Instead, he argued that the State failed to meet its burden on either rape charge. The facts here cannot be distinguished from *Coristine* and *Lynch*. As in *Lynch*, the fact that Barnes testified that Russell consented to sexual contact did not justify giving an affirmative defense instruction. *Lynch*, 178 Wn.2d at 494. Accordingly, we hold that the trial court erred when it instructed the jury on the affirmative defense of consent.

State v. Barnes, 181 Wn. App. 1035 review denied, 339 P.3d 634 (Wash. 2014).

Based upon this holding this court reversed the defendant's two convictions for second degree rape and remanded for a new trial. What this court did not address, and what the defendant's prior appellant attorney did not address, was the effect that the erroneous instruction had upon the sexual motivation element of the first degree burglary conviction. As the following explains, the erroneous instruction on consent as an affirmative defense also denied the defendant his right under the Sixth Amendment to control the defense on the sexual motivation enhancement the state added to the first degree burglary charge.

Under RCW 9.94A.533, the legislature has set out a number of “adjustments to the standard range” which will increase a defendant’s sentence. Subsection (8) of that statute provides for such an adjustment for a defendant who commits an offense with “sexual motivation.” This subsection states:

(8)(a) The following additional times shall be added to the standard sentence range for felony crimes committed on or after July 1, 2006, if the offense was committed with sexual motivation, as that term is defined in RCW 9.94A.030. If the offender is being sentenced for more than one offense, the sexual motivation enhancement must be added to the total period of total confinement for all offenses, regardless of which underlying offense is subject to a sexual motivation enhancement. If the offender committed the offense with sexual motivation and the offender is being sentenced for an anticipatory offense under chapter 9A.28 RCW, the following additional times shall be added to the standard sentence range determined under subsection (2) of this section based on the felony crime of conviction as classified under RCW 9A.28.020:

(i) Two years for any felony defined under the law as a class A felony or with a statutory maximum sentence of at least twenty years, or both;

(ii) Eighteen months for any felony defined under any law as a class B felony or with a statutory maximum sentence of ten years, or both;

(iii) One year for any felony defined under any law as a class C felony or with a statutory maximum sentence of five years, or both;

(iv) If the offender is being sentenced for any sexual motivation enhancements under (a)(i), (ii), and/or (iii) of this subsection and the offender has previously been sentenced for any sexual motivation enhancements on or after July 1, 2006, under (a)(i), (ii), and/or (iii) of this subsection, all sexual motivation enhancements under this subsection shall be twice the amount of the enhancement listed;

RCW 9.94A.533(8)(a).

A sentencing enhancement under this statute is treated as if it were an element of the offense to which it applies because the “adjustment” increases the sentence beyond the maximum otherwise authorized for the underlying offense. *State v. Recuenco*, 163 Wn.2d 428, 180 P.3d 1276 (2008). As a result, unlike aggravating facts alleged under RCW 9.94A.537 which are not treated as elements of an offense and need not be alleged as part of an information, enhancements alleged under RCW 9.94A.533 must be included in the information. *State v. Siers*, 174 Wn.2d 269, 274 P.3d 358 (2012) (State need only put defendant on “notice” of alleged aggravating facts and need not include them in the information); *State v. Crawford*, 159 Wn.2d 86, 94, 147 P.3d 1288 (2006) (Failure to include enhancement allegation in the information violates a defendant’s constitutional right to notice of the offense alleged).

Since enhancements are treated as elements of the underlying offense charged, the state also has the burden of unanimously proving them beyond a reasonable doubt, although they need not be found by special verdict as with aggravating factors under RCW 9.94A.537(3). *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *State v. Mason*, 160 Wn.2d 910, 937, 162 P.3d 396 (2007). Thus, in the case at bar, the state had the burden of proving the sexual motivation element of the first degree

burglary charge beyond a reasonable doubt as one of the elements of that offense. In RCW 9.94A.030(47) the legislature defined “sexual motivation” as follows:

(47) “Sexual motivation” means that one of the purposes for which the defendant committed the crime was for the purpose of his or her sexual gratification.

RCW 9.94A.030(47).

In this case the state charged the defendant with first degree burglary under RCW 9A.52.020, which states:

(1) A person is guilty of burglary in the first degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building and if, in entering or while in the building or in immediate flight therefrom, the actor or another participant in the crime (a) is armed with a deadly weapon, or (b) assaults any person.

(2) Burglary in the first degree is a class A felony.

RCW 9A.52.020.

Under this statute there are two alternative methods for elevating what would be a second degree burglary into a first degree burglary: (1) be armed with a deadly weapon during the offense, or (2) assault another person during the offense. In this case the state alleged both alternatives in the amended information and the “to convict” instruction. However, the state neither presented any evidence of a deadly weapon nor argued under this alternative. Rather, the state’s theory of the case, and the only theory that was supported

by the evidence, was that the “assault” that the defendant committed while unlawfully in a building was the second degree rape which the state alleged in Count II, and which also constituted the necessary proof of the defendant’s sexual motivation. This court recognized this fact when it held as follows concerning the trial court’s ruling that the rape charge from Count II and the first degree burglary charge from Count III constituted the same criminal conduct:

The trial court did not specify which second degree rape conviction was the same criminal conduct as the first degree burglary. However, we fairly can assume that the trial court was referring to count two, which involved the rape in Johnson’s house.

State v. Barnes, 181 Wn.App. 1035, footnote 2, *review denied*, 339 P.3d 634 (Wn. 2014).

As a result, under the facts of this case, the trial court’s decision to give the unrequested instruction on the affirmative defense of consent not only shifted the burden of proof on the rape charge, but it also shifted the burden of proof on the sexual motivation allegation in the first degree burglary charge because the sexual motivation the state alleged existed in Count III was the fact of the rape alleged in Count II. As a result, the same error that required this court to reverse the second degree rape convictions should also require this court to strike the sexual motivation allegation from the first degree burglary charge. Consequently, the trial court in this case

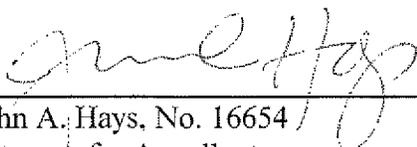
erred when it resentenced the defendant on the first degree burglary charge with the sexual motivation enhancement added. Thus, this court should vacate the defendant's sentence and remand for a resentencing hearing with the sexual motivation aggravator deleted.

CONCLUSION

The trial court in this case erred when it resentenced the defendant to first degree burglary with the sexual motivation enhancement added.

DATED this 25th day of August, 2015.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

UNITED STATES CONSTITUTION, SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

RCW 9.94A.030(47)

(47) "Sexual motivation" means that one of the purposes for which the defendant committed the crime was for the purpose of his or her sexual gratification.

RCW 9.94A.533(8)(a)

(8)(a) The following additional times shall be added to the standard sentence range for felony crimes committed on or after July 1, 2006, if the offense was committed with sexual motivation, as that term is defined in RCW 9.94A.030. If the offender is being sentenced for more than one offense, the sexual motivation enhancement must be added to the total period of total confinement for all offenses, regardless of which underlying offense is subject to a sexual motivation enhancement. If the offender committed the offense with sexual motivation and the offender is being sentenced for an anticipatory offense under chapter 9A.28 RCW, the following additional times shall be added to the standard sentence range determined under subsection (2) of this section based on the felony crime of conviction as classified under RCW 9A.28.020:

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(ii) Eighteen months for any felony defined under any law as a class B felony or with a statutory maximum sentence of ten years, or both;

(iii) One year for any felony defined under any law as a class C felony or with a statutory maximum sentence of five years, or both;

(iv) If the offender is being sentenced for any sexual motivation enhancements under (a)(i), (ii), and/or (iii) of this subsection and the offender has previously been sentenced for any sexual motivation enhancements on or after July 1, 2006, under (a)(i), (ii), and/or (iii) of this subsection, all sexual motivation enhancements under this subsection shall be twice the amount of the enhancement listed;

RCW 9A.52.020

(1) A person is guilty of burglary in the first degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building and if, in entering or while in the building or in immediate flight therefrom, the actor or another participant in the crime (a) is armed with a deadly weapon, or (b) assaults any person.

(2) Burglary in the first degree is a class A felony.

COURT OF APPEALS OF WASHINGTON, DIVISION II

STATE OF WASHINGTON,
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NO. 47611-8-II

vs.

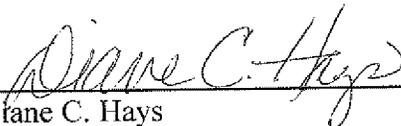
**AFFIRMATION
OF SERVICE**

COREAN O. BARNES,
Appellant.

The under signed states the following under penalty of perjury under the laws of Washington State. On the date below, I personally e-filed and/or placed in the United States Mail the Brief of Appellant with this Affirmation of Service Attached with postage paid to the indicated parties:

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Dated this 25th day of August, 2015, at Longview, WA.


Diane C. Hays

HAYS LAW OFFICE

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